Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

FRANK NAJJOR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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37 pgs

STATEMENT OF ISSUES PRESENTED

1. Whether the Court of Appeals' ruling that bank fraud was a continuous offense for the purpose of the statute of limitations violates the dictates of previous opinions of this Court and thereby undermines the integrity of the fact finding process in the trial of a bank fraud case?

2. Whether the Court of Appeals' interpretation of United States Sentencing Guidelines 2 F1.1, which calculates the loss to the victim in a bank fraud case, was incorrect and in conflict with the interpretation of other circuits?

LIST OF PARTIES

Petitioner:

FRANK NAJJOR

Respondent:

UNITED STATES OF AMERICA

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Frank Najjor, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeal for the Ninth Circuit filed on July 2, 2001, and Petition for Rehearing denied on August 3, 2001.

OPINION BELOW

On July 2, the Appellate Court entered its opinion affirming the conviction of Petitioner for bank fraud. (United States v. Najjor) 255 F 3d 979 (2001). A copy of the opinion is attached as Appendix 1-12.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254. On August 3, 2001, the Court of Appeals denied Petitioner's "Petition for Rehearing.". (Attached as Appendix 13) This Petition is being timely filed pursuant to the Supreme Court Rules of Court, Rule 13.1. (S.Ct. Rules)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 18 USC 1344 Bank Fraud

Whoever knowingly executes, or attempts to execute a scheme or artifice-

(1) to defraud a financial institution: or

(2) to obtain money, funds, credits, assets,

securities, or other property owned by, or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations, or promises: shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

2. 18 USC 3293

No person shall be prosecuted, tried or punished for a violation of or a conspiracy to violate-

(1) Section 215, 656, 657, 1005, 1014, 1033, or 1344;

(2) section 1341 or 1343 if the offense affects a financial institution: or,

(3) section 1963, to the extent that the racketeering activity involves a violation of section 1344:

unless the indictment is returned or the information is filed within 10 years after the commission of the offense.

3. United States Sentencing Guidelines section 2F1.1; Fraud and Deceit; Forgery; Offense Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer obligations of the United States.

(A) Base Offense Level: 6

(B) Specific Offense Characteristics

(1) If the loss exceeds $2000, increase the offense level as follows: (according to a table)

4. United States Sentencing Guidelines 2F1.1 application note 7 (b) (From 1986 Guidelines) In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

STATEMENT OF THE STATEMENT

A. Procedural Background.

Frank Najjor was convicted and sentenced for two counts of bank fraud in violation of 18 U.S.C section 1344 and 18 U.S.C. section 2. The district court sentenced Najjor to thirty-three months in custody and ordered him to pay restitution to Home Federal Savings and Loan ("Home Federal") and Torrey Pines Bank ("Torrey Pines").

On appeal Najjor contended that Count One of the indictment was barred by the statute of limitations. He also argued that the district court erroneously

calculated the loss to Home Federal in determining his sentence and failed to properly consider all the evidence before making its restitution order. The Appellate Court upheld the lower courts rulings concerning the statute of limitations and the sentencing calculations. The Appellate Court reversed the ruling concerning the restitution.

B. Factual Background

In 1985, Najjor formed the Miramar Mall Limited Partnership("Partnership") and assumed the role of general partner. In 1986, Najjor applied for a $5.4 million commercial loan with Home Federal. The application process began in August 1986. In order to secure the loan, Home Federal required Najjor to obtain an independent appraisal of the property. The appraiser relied heavily upon leases submitted by Najjor. The submitted leases showed that the Miramar Mall facility was almost fully leased to commercial tenants for five-year terms. In fact, the leases provided by Najjor were falsified. The appraiser valued the property based upon these false leases.

Najjor then submitted the independent appraisal and signed leases to a Home Federal loan officer as part of the loan application. The loan officer relied heavily on the false leases and the appraisal based on the false leases in recommending approval of the loan. On December 2, 1986, the Home Federal

lending committee approved
the loan. On December 11, 1986, Najjor signed documents in connection with the loan. The loan was funded on December 17, 1986.

As part of the Home Federal loan agreement a $300,000 collateral pledge was held in a savings account at Home Federal. On December 23, 1988, Home Federal released the $300,000 collateral pledge to Najjor.

In 1989, Najjor settled litigation with a partner and turned over his interest in the Miramar Mall to that partner. The new owners were unable to make payments on the bank loans and the property was placed in bankruptcy. On June 20, 1991, Home Federal purchased the property back at a trustee's sale for $3.5 million. In 1993, Home Federal sold the property for $3.96 million. During the 22 months that Home Federal owned the Miramar Mall, it operated the Mall at a net profit of over $800,000.

On appeal, Najjor contended : (1) that Count One was time - barred by the ten year statute of limitation; (2) the district court erred in calculating the amount of restitution payable to Home Federal because it failed to consider evidence of payments and receipts by Home Federal: and (3) the district court incorrectly calculated the amount of loss to Home Federal for sentencing purposes as the full amount of

the $5.4 million loan because the bank recovered a substantial amount of the loan from the pledged collateral.

The Appellate Court ruled: (1) that Count One was not time barred, (2) that the court had correctly calculated the loss to the victim in determining Najjor's sentence, and (3) that the trial court had failed to properly determined the amount of restitution owed by Najjor.

REASONS FOR GRANTING THE WRIT

1. BY RULING THAT BANK FRAUD WAS A CONTINUING CRIME FOR THE PURPOSES OF THE STATUTE OF LIMITATIONS, THE APPELLATE COURT VIOLATED THE DICTATES OF PREVIOUS OPINIONS OF THIS COURT AND THEREBY UNDERMINED THE INTEGRITY OF THE FACT FINDING PROCESS IN THE TRIAL OF A BANK FRAUD CASE.

In the present matter, the government filed the indictment on December 4, 1996. Since the statute of limitations, 18 U.S.C. 3293, begins to run when the crime has been completed, the question here is whether the crime charged in count one was completed prior to December 4, 1986. See, Toussie v. United States 397 U.S. 115 (1970) The government presented evidence that petitioner provided several falsified leases to Home Federal as part of a loan

application. All of these events occurred prior to December 2, 1986, the date on which the bank approved the loan. The Appellate Court, however, ruled that bank fraud was a continuing offense and that since petitioner signed a promissory note on December 11, 1996, the statute had not run. The Court of Appeals, erred because the signing of the promissory note was not an element of the crime, and in fact, the crime had been fully completed or executed prior to December 4, 1986.

The purpose of a statute of limitations is to limit exposure to criminal prosecution to a "certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Id. At 114. The statute of limitations is designed to protect individuals from having to defend themselves against charges when the basic facts have become obscured by the passage of time. Id., at 114. For these reasons, courts have stated that criminal limitations statutes should be liberally interpreted in favor of repose. United States v. Scharton, 285 516, 522 (1932)

In Toussie v. United States , 397 U.S. 112 (1970), the defendant was charged with draft evasion. The government argued that the offense of draft evasion was a continuous offense since the defendant violated the statute every day subsequent to the first day that

he failed to register. In ruling that the crime of draft evasion was not a continuing offense, the Court noted that Congress had declared a policy that the statute of limitations should not be extended except as otherwise provided by law. Id., at 115.

The Court further stated:

> "These principles indicate that the doctrine of continuing offense should be applied in only limited circumstances since, as the Court of Appeals correctly observed in this case, '(t)he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statue beyond its stated term.' These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one. Id. , at 115.

Certainly, the Toussie Court intended that an offense should not be labeled as continuous unless the

Congress had made its intention very explicit.

In the present matter, the Court of Appeals, without any discussion, stated that bank fraud was a continuous offense, and based its decision upon United States v. Nash, 115 F. 3d 1431 (9th Cir. 1994). The Nash case, however, did not involve an issue of the statute of limitations. The Nash ruling that bank fraud was a continuing offense was in the context of a sentencing guidelines issue. Thus, there was no discussion in either Nash or Najjor about the stringent principles set forth in Toussie or about the tension between the purpose of the statute of limitations and the continuing offense doctrine. In fact, the continuing offense doctrine was transferred from a sentencing issue to a statute of limitations case without any discussion at all.

In determining whether an offense is a continuous one, the principles set forth in Toussie offer important guidance. Since the statute of limitations is designed to protect individuals from having to defend themselves against charges when the basic facts have become obscured by the passage of time, it is essential to determine the basic facts of the crime of bank fraud. The statute states:

> "Whoever, knowingly executes, or attempts to execute, a scheme or artifice-

1. To defraud a financial institution; or

2. To obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations or promises....: 18 USC section 1344.

The bank fraud statute makes it illegal to willfully provide false information to a bank in order to obtain money, funds or others items of value. In other words, the law imposes an obligation to be truthful in doing business with a bank. See, United States v. Molinaro, 11 F 3d 853, fn. 16 (9th Cir. 1993). The risk to the bank comes in the form of the false or misleading information. Once the perpetrator submits or conveys his false or deceptive information to the bank, which results in the approval of the loan, the scheme is completed, and all of the elements of the offense have been committed. These are the basic facts of bank fraud. It is not necessary for the loan to have ever been funded or processed for the crime to have been completed. United States v. Hollis, 971 F. 2d 1441, 1452(10th Cir.1992)

There is nothing in the language of 18 U.S.C. 1344 that compels a conclusion that Congress intended bank fraud to be a continuous offense. The fact that

the offense involves a scheme does not mean that it is a continuing crime. Whatever the scheme involves, once those acts of deception have been perpetrated, the scheme ends. Usually, that will mean that the scheme ends when the initial false information is provided to the bank. There may be times when the scheme involves a later cover-up to hide the initial deception. But, again, once those acts of deception have been committed, the scheme comes to an end. This type of offense is very different from one in which the prohibited act continues indefinitely, such as, the continuous act of remaining in the country after one's visa permit expired. See, United States v. Cores, 356 U.S. 405, 78 S.Ct. 875 (1958) In this context, it is difficult to understand what it means to label bank fraud a continuing offense. Does it mean that each and every clerical act performed by the bank, such as servicing the loan for the subsequent 10, 20, or 30 years continues the crime for the purpose of the statute of limitations? Do the payments by the borrower, or the continued possession of the property mean that the offense continues, with the result the statute of limitation could be extended for life? Using the reasoning of the Court of Appeals, one could conclude that the scheme of almost every perpetrator includes both the false statements made to obtain the loan and the continued possession of the

property that is used as security for the loan. The result would be that the ten years limitation on bringing an action would be extended indefinitely. This ruling clearly is contrary to the both the ruling in Toussie and the purpose of Congress in enacting the statute of limitations.

The statute of limitations mandates that there is a limit to criminal exposure after an offense has been committed. In a bank fraud case, Congress has decided that the integrity of the fact finding process is compromised when the government brings a case more than ten years after the crime of bank fraud was committed. In bank fraud cases, Congress did not make it illegal to sign promissory notes, to obtain money from banks, or to occupy property purchased with a bank loan. It made it illegal to execute a scheme to defraud a bank or to obtain money through false pretenses. Those are the acts which constitute the crime and which the government must prove at trial. The integrity of the fact finding process must be concerned with the proof of those acts. Thus, the statute of limitations must be interpreted in a way that protects the integrity of the basic facts of the offense that the government is attempting to prove. It undermines the very purpose of the statute of limitations to extend the time to bring a action to some later date when a clerical act occurs

which is not an element of the offense and which does not need to be proved at trial.

In the present matter, the indictment was filed on December 4, 1996. All acts constituting the crime of bank fraud were committed prior to December 2, 1986, when the loan was approved. For these reasons, the statute of limitation bars the prosecution of count one.

2. THE COURT OF APPEALS DECISION, WHICH WAS IN CONFLICT WITH OTHER CIRCUITS, MISINTERPRETED THE UNITED STATED SENTENCING GUIDELINES 2F1.1, IN CALCULATING THE LOSS TO THE VICTIM

USSG 2F1.1 governs the base offense level for the crime of bank fraud. The base offense level starts at a level 6. If the loss exceeds $2000, the base offense level is increased incrementally according to the amount of the loss. Application note 7(b), which applies to fraudulent loan application cases, states that the loss is the actual loss to the victim. As an example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid, reduced by the amount the lending institution has recovered or can expect to recover from the assets pledge to secure the loan. If the intended loss, however, is greater than the actual

loss, the intended loss is to be used.

In the present matter, the Court of Appeals ruled that since the trial court had found that Najjor did not intend to repay the loan, the intended loss was the entire amount of the loan. (Najjor, at 985) In doing so, the Court of Appeals treated the case like a theft case instead of a fraud case in which a very substantial amount of collateral was used to secure the loan. Other circuits, while noting the conflict in this area, have set forth a more flexible approach which appropriately distinguishes theft and fraud cases. In United States v. Johnson, 16 F. 3d 166, 172 (7th Circ. 1994) the court stated that to " simply base the sentence on the face value of the loan without a finding that the defendant intended to walk away with the full amount fraudulently obtained, or that it even was probable that the victim would suffer such a loss contravenes the Guideline distinction between fraud and theft cases. Likewise, cases in other circuits have reached similar conclusions that in bank fraud cases where substantial collateral has been used to secure a loan, the intended loss is not the entire amount of the loan. See, United States v. Kopp, 951 F 2d 531 (3d Cir. 1991), and, United States v. Smith, 951 F.2d 1163,1167(10th Circ. 1991).

In the present matter, as security for the loan, which was for $5.4 million, petitioner pledged: land

valued at $750,000, a building that cost $4.0 million to build, improvements worth up to $750,000, and gross income of up to $1.0 million per year.

Based upon the amount of assets that petitioner left as security, it was impossible for him to have intended the bank to loose the entire amount of the loan. The Court of Appeals based its decision upon the fact that petitioner did not intend to repay the loan. The fault with this method is that it bears almost no relationship to the intended loss. Even if petitioner did not intend to repay a penny of the loan, by leaving the bank with millions of dollars of real property, he could not have intended the bank to loose the entire amount of the loan, or even most of it.

The actual or intended loss cannot be determined with the simple formula of a theft case, which equates the object of the theft with the intended loss. The Court of Appeals ended its analysis when it found that petitioner did not intend to repay the loan. However, the answer to the question, "Did petitioner *intend to repay the loan*?" does not answer the question posed by the Guidelines, "What was the *intended loss*?" Here, petitioner gave the bank the land and building as represented in the loan documents. What he did not give to the bank was the long term guaranteed leases that were describe in the loan documents. Clearly, petitioner

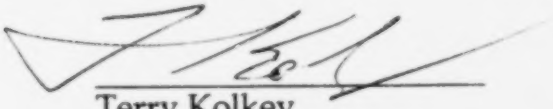
intended the bank to loose the value of the long term security of a guaranteed stream of income. He did not, however, intend the bank to loose the entire amount of the loan. The approach used by the Court of Appeals to determine the intended loss was wholly inadequate to

make such a determination. Since the Court of Appeals did not make a rational and fair determination of the intended loss for sentencing purposes, the matter should be remanded for a rehearing on that issue.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,



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United States Court of Appeals,
For the Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,	)	Nos. 98-50748 99-50476.
v.	)	
Frank NAJJOR, Defendant-Appellant.	)	

Argued and Submitted Dec. 7, 2000

Filed July 2, 2001

Following jury trial, defendant was convicted in the United States District Court for the Southern District of California, Irma E. Gonzalez, J., of bank fraud. Defendant filed first notice of appeal after he was sentenced, and his second notice of appeal after district court affirmed sentence. The Court of Appeals, Hug, Circuit Judge, held that: (1) it lacked jurisdiction over issues included in defendant's second notice of appeal; (2) prosecution was not barred by statute of limitations; (3) district court erred in failing to consider all evidence prior to ordering restitution; and (4) increasing sentence under guidelines 11 levels was warranted.

Affirmed in part, reversed in part, and remanded.

Terry R. Kolkey, San Marcos, California, for the appellant.

Peter A. Frandsen, Trial Attorney, U.S. Department of Justice, San Diego, California, for the appellee.

Appeal from the United States District Court for the Southern District of California; Irma E. Gonzalez, District Judge, Presiding. D.C. No. CR-96-02282- IEG.

Before: GOODWIN, HUG, and PREGERSON, Circuit Judges.

HUG, Circuit Judge:

Frank Najjor appeals his conviction and sentence for two counts of bank fraud in violation of 18 U.S.C. § 1344 and 18 U.S.C. § 2. The district court sentenced Najjor to thirty-three months in custody and ordered Najjor to pay restitution to Home Federal Savings and Loan ("Home Federal") and Torrey Pines Bank ("Torrey Pines"). On appeal, Najjor contends that Count One of the indictment was barred by the statute of limitations. Najjor also *981(Cite as: 255 F.3d 979, *981)

argues that the district court erroneously calculated the loss to Home Federal in determining his sentence and failed to properly consider all the evidence before making its restitution order. The district court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 (Cite as: 255 F.3d 979, *981) U.S.C. § 1291, and we affirm in part and reverse in part.

BACKGROUND

Najjor, a distributor of dairy products, sought to build a cold storage building in the Mira Mesa area of San Diego. The building was to be used for the long-term storage of dairy products and ice cream in commercial quantities. In order to purchase the land and construct the cold storage building, Najjor formed

the Miramar Mall Limited Partnership ("Partnership") and assumed the role of general partner.
In 1985, Najjor borrowed $4 million from Torrey Pines for the acquisition, development, and construction of the cold storage project. The Partnership then developed the property and constructed the cold storage facility. In 1986, Najjor applied for a $5.4 million commercial loan with Home Federal. In order to secure the loan, Home Federal required Najjor to obtain an independent appraisal of the property. Because the Miramar Mall property was unique and difficult to evaluate from a commercial lending perspective, the independent appraiser relied heavily on the property's potential earnings from leases submitted by Najjor. The submitted leases showed that the Miramar Mall facility was almost fully leased to commercial tenants for five-year terms. In fact, the leases provided by Najjor were falsified. The appraiser valued the property based on these false leases.

Najjor then submitted the independent appraisal and signed leases to a Home (Cite as: 255 F.3d 979, *981) Federal loan officer as part of the loan application process. The loan officer relied heavily on the false leases and the appraisal based on the false leases in recommending approval of the loan. On December 2, 1986, the Home Federal lending committee approved the loan. On December 11, 1986, Najjor signed documents in connection with the loan and the $5.4 million note payable to Home Federal. The loan was funded on December 17, 1986.

Najjor used $4 million to pay off the Torrey

Pines construction loan and approximately $400,000 was used for expenses and to pay off other loans. Najjor also received $705,082 in cash from Home Federal. As part of the Home Federal loan agreement, a $300,000 collateral pledge was held in a savings account at Home Federal. On December 23, 1988, Home Federal released the $300,000 collateral pledge account to Najjor.

In 1987, Najjor applied to Torrey Pines for a $500,000 line of credit to improve the cold storage facility. Najjor also submitted to Torrey Pines a list of tenants and rental payments indicating that the leases at the cold storage property were for five-year terms. Relying on the leases and an income statement prepared by Najjor, the Torrey Pines lending committee approved the loan. Najjor then signed a line of credit note payable to Torrey Pines for $500,000. Najjor made interest-only monthly payments of about $50,000 on the Home Federal loan until about December 1988. He extended the due date of the Torrey (Cite as: 255 F.3d 979, *981) Pines loan. By late 1988, Najjor began separating himself from the Miramar Mall Partnership. He settled litigation with a partner by turning over substantial interests in both businesses to that partner. Najjor ultimately sold the Miramar Mall property and set up another freezer facility a few miles away. Najjor drew tenants from Miramar Mall to the new property. The new owners of the Miramar Mall property *982(Cite as: 255 F.3d 979, *982) were unable to make payments because of the reduced cash flow. Home Federal loaned $155,000 to

the new owners to pay property taxes on the property. Ultimately, the loans went into default as the property was over-appraised and under-leased. In the end, the new owners placed the property in bankruptcy. On June 20, 1991, Home Federal purchased the property back at a trustee's sale for a $3.5 million non-cash lender-bid. In 1993, Home Federal sold the property for $3.96 million. Torrey Pines was unable to collect any of the money borrowed by Najjor. In December 1988, the outstanding balance on the Torrey Pines loan was $396,911.

A federal grand jury returned a three-count indictment against Najjor charging him with bank fraud pursuant to 18 U.S.C. § 1344, and aiding and abetting pursuant to 18 U.S.C. § 2. Count One charged Najjor with executing a scheme to defraud Home Federal. Count Two charged Najjor with executing a scheme to defraud Torrey Pines. Count Three charged Najjor with executing a scheme to defraud another company, Mutual Investment. Count Three is not at issue in (Cite as: 255 F.3d 979, *982) this appeal.

Najjor filed a motion to dismiss Count One of the indictment alleging that the ten-year statute of limitations under 18 U.S.C. § 3293 had run. The district court denied the motion to dismiss.

A jury trial commenced on May 19, 1998 and continued for ten days. The jury convicted Najjor of Counts One and Two but found him not guilty of Count Three. The district court held a sentencing hearing on November 9, 1998 and sentenced Najjor to

thirty-three months in custody as to each count to run concurrently after which Najjor was to remain on supervised release for three years. The district court also ordered restitution in the amount of $2.19 million to the successor of Home Federal and restitution of $396,911 to the successor of Torrey Pines.

At the sentencing hearing, Najjor asked to be heard further on the restitution matter and the district court agreed to hold a second sentencing hearing. However, on November 12, 1998, the district court entered a judgment based upon the sentence announced on November 9, 1998 from which Najjor timely appealed. Because a notice of appeal had been filed with this court, Najjor moved for limited remand to hold his case in abeyance pending resolution of the restitution issue at the second sentencing hearing. This court denied the motion. n June 21, 1999, the district court held the second sentencing (Cite as: 255 F.3d 979, *982) hearing. The district court denied Najjor's motion to modify his sentence and affirmed the judgment entered on November 12, 1998. Najjor filed a second notice of appeal. This court consolidated the two appeals.

On appeal, Najjor contends: (1) Count One was time-barred by the ten-year statute of limitations because the indictment was returned more than ten years after completion of the offense; (2) the district court erred in calculating the amount of restitution payable to Home Federal because it failed to consider evidence of payments and receipts by Home Federal; and (3) the district court incorrectly calculated the

amount of loss to Home Federal for sentencing purposes as the full amount of the $5.4 million loan because the bank recovered a substantial amount of the sum loaned.

ANALYSIS

A. District Court's Jurisdiction to Enter Second Sentencing Order

As an initial matter, the government argues that the district court did not have jurisdiction to enter the second sentencing *983(Cite as: 255 F.3d 979, *983) order at the June 21, 1999 hearing because Najjor had already filed a notice of appeal of the judgment entered November 12, 1998.

At the November 9, 1998 sentencing hearing, Najjor's counsel argued that the method used to determine the restitution amount was flawed. The court indicated its willingness to hear Najjor's argument on the restitution matter but stated that time constraints would require the matter to be heard at a (Cite as: 255 F.3d 979, *983) later date. The court then stated that the judgment would stand as it was and the court would modify the judgment if necessary after a second sentencing hearing. The court scheduled a subsequent hearing which it held on June 21, 1999.

It is undisputed that Najjor timely filed his first notice of appeal after the entry of the November 12, 1998 judgment. Najjor did not file a motion to modify or reconsider the sentence pursuant to Federal Rule of Criminal Procedure 35(c), which would have extended the time for filing a notice of appeal until the order

disposing of the motion was entered. See United States v. Barragan-Mendoza, 174 F.3d 1024, 1026 (9th Cir.1999). Najjor could have then appealed from the order granting or denying his motion to modify the sentence.

[1] The judgment entered November 12, 1998 was a final judgment and the filing of the notice of appeal conferred jurisdiction on the court of appeals and divested the district court of its control over those aspects of the case involved in the appeal. See United States v. Ortega-Lopez, 988 F.2d 70, 72 (9th Cir.1993). Thus, although the district court believed it retained jurisdiction to reconsider the restitution issue, the filing of the notice of appeal of the November 12, 1998 judgment divested the district court of jurisdiction to enter its June 21, 1999 sentencing order. Accordingly, we lack jurisdiction over the second appeal and will consider only the issues presented (Cite as: 255 F.3d 979, *983) in Najjor's appeal of the November 12, 1998 judgment.

B. Statute of Limitations

Najjor argues that Count One of the indictment, charging him with defrauding a bank in violation of 18 U.S.C. § 1344, was barred by the statute of limitations. Specifically, he maintains that all acts constituting the crime of bank fraud were committed prior to December 2, 1986, when the loan was approved. The district court concluded that the signing of the note

payable to Home Federal by Najjor, which occurred on December 11, 1986, was in furtherance of the bank fraud scheme, and
thus Count One was not time-barred by the statute of limitations. We agree.

[2] Under 18 U.S.C. § 3293, the statute of limitations for violations of 18 U.S.C. § 1344 is ten years. See 18 U.S.C. § 3293. "[S]tatute of limitations normally begin to run when the crime is complete." Toussie v. United States, 397 U.S. 112, 115, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970) (quoting Pendergast v. United States, 317 U.S. 412, 418, 63 S.Ct. 268, 87 L.Ed. 368 (1943)). The government filed the indictment on December 4, 1996. Thus, the commission of the offense must have been committed on or after December 4, 1986. Najjor contends that the submission of the false documents to Home Federal, prior to December 2, 1986, were the acts putting the bank at risk. He maintains that once he submitted the documents the scheme was complete.

[3] We have held that a violation of 18 U.S.C. § 1344 is a continuing (Cite as: 255 F.3d 979, *983) offense. See United States v. Nash, 115 F.3d 1431, 1441 (9th Cir.1997). The signing of the loan note was in furtherance of the scheme to defraud Home Federal. Here, Najjor signed the note payable to Home Federal on December 11, 1986. On December 4, 1996, the government charged Najjor with *984(Cite as: 255 F.3d 979, *984) executing a scheme to defraud Home Federal. The charge was brought within ten years of the date that Najjor signed the note. Thus, the district

court correctly concluded that the indictment was returned within the limitations period and the government could prosecute Najjor for the entire scheme to defraud Home Federal.

C. Restitution

[4][5] Najjor contends that the district court erred in calculating the restitution payable to Home Federal. Specifically, he contends that the district court failed to properly consider all the evidence in calculating the amount of restitution owed to Home Federal. "A restitution order is reviewed for abuse of discretion, provided that it is within the bounds of the statutory framework." United States v. Lawrence, 189 F.3d 838, 846 (9th Cir.1999). The factual findings underlying these orders are reviewed for clear error. Id. We conclude that the district court clearly erred when it failed to consider all the evidence prior to ordering restitution at $2.19 million.

[6][7] Under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663, restitution may be ordered only for "the loss caused by the (Cite as: 255 F.3d 979, *984) specific conduct that is the basis of the offense of conviction." Hughey v. United States, 495 U.S. 411, 413, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990). The district court has broad discretion to determine the type and amount of evidence required to support an award of restitution. See United States v. Zink, 107 F.3d 716, 718-19 (9th Cir.1997). However, "in determining the appropriate amount of restitution, the district court should not accept uncritically an amount

recommended by the probation office." United States v. Barany, 884 F.2d 1255, 1261 (9th Cir.1989). The sentencing court is responsible for making an independent determination as to the amount of loss the victim suffered as a result of the defendant's conduct. Id at 1260.

[8] Prior to the sentencing hearing, the government produced a document showing the loan balance and foreclosure bid by Home Federal to get the property back. The probation department took the outstanding loan balance of $5.69 million and subtracted Home Federal's $3.5 million bid to take the property back, leaving a net loss of $2.19 million for restitution purposes. At the sentencing hearing, the district court adopted this figure based solely on the findings made by the probation department. When Najjor's counsel attempted to argue that the method used to reach the restitution amount was flawed, the judge responded: I'm willing to hear this issue just on the restitution, and I can set it for another hearing ... and we can have the Probation Office and you come in (Cite as: 255 F.3d 979, *984) with what you believe should be the restitution order. I mean, there certainly is some restitution that is owed, and I picked that figure, because that's what the Probation Office suggested.

Thus, at the first sentencing hearing, the district court simply accepted the probation office's calculation and failed to independently assess the amount of loss to Home Federal. In fact, the court admitted that it "wasn't satisfied completely with the probation office's

calculations" and had not had the time in the first hearing to consider all the figures presented to the court.

The court intended to further consider the restitution issue at the second hearing. At the second hearing, the court briefly heard Najjor's arguments as to why the restitution amount was incorrectly calculated. However, upon learning from the government that the court lacked jurisdiction to reconsider the sentence, the court *985(Cite as: 255 F.3d 979, *985) declined to
further reconsider the restitution issue. Because the district court did not assess all the evidence prior to ordering restitution at $2.19 million, we remand for the district court to consider all the evidence pertaining to the restitution order and make an independent determination of the actual loss Home Federal suffered as a result of Najjor's conduct.
D. Calculation of Amount of Loss In Sentencing
[9] Najjor contends that the district court erred in increasing his sentence eleven levels under United States Sentencing Guidelines ("U.S.S.G.") (Cite as: 255 F.3d 979, *985) § 2F1.1 based on the court's determination that the loss to Home Federal was the full amount of the $5.4 million loan. The district court's factual findings used in sentencing, including the calculation of loss to the victims, are reviewed for clear error. United States v. Blitz, 151 F.3d 1002, 1009 (9th Cir.1998).

The district court calculated the base offense level at six under U.S.S.G. § 2F1.1(a) because the

offense involved fraud or deceit. The district court then reviewed the evidence and found that Najjor did not intend to repay the loan to Home Federal. Thus, the court calculated the loss to Home Federal as the entire amount of the loan, or $5.4 million, that Najjor did not intend to repay. Based on this determination, the district court increased Najjor's offense level by eleven levels, the maximum as of November 15, 1988 for a loss that large. U.S.S.G. § 2F1.1(b)(1)(L) (1988) (stating that if the loss exceeded $5,000,000 the base offense level must be increased by eleven levels).

[10] The sentencing range for fraud varies F.3d 979, *985) 1352-53 (9th Cir.1992), cert. denied, 507 U.S. 966, depending on the amount of loss. See U.S.S.G. § 2F1.1 (1988). Loss is defined as either the actual or the intended loss-whichever is greater. See id., ftn.7. The amount of the loss need not be determined with precision. See id., fnt. n.8. The court need only make a reasonable estimate. Id. When the defendant has no intent to repay or otherwise make good on a loan, the loss is the gross value of the loan taken from the bank. United States v. Galliano, 977 F.2d 1350, (Cite as: 255 113 S.Ct. 1399, 122 L.Ed.2d 772 (1993).

[11][12] Given the record, the district court's finding that Najjor did not intend to repay the loan is not clearly erroneous. Thus, the district judge did not err in determining Najjor's offense level based on the full amount of the fraudulently obtained loan. See id. Because this is not a case in which the defendant fraudulently obtained a loan without providing any security, the district court had the discretion to grant a

downward departure based on the collateral pledged to secure the loan. See United States v. Hutchison, 22 F.3d 846, 855 (9th Cir.1993) (abrogated on other grounds by United States v. Wells, 519 U.S. 482, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997)); United States v. Shaw, 3 F.3d 311, 314 (9th Cir.1993) ("The court may depart from [the intended loss] level if the circumstances warrant a departure ..."). However, the record demonstrates that the district court acknowledged its authority to grant a downward departure but, in its discretion, declined to do so. We have no jurisdiction to review a district court's discretionary denial of a downward departure request. United States v. Lipman, 133 F.3d 726, 729 (9th Cir.1998).

AFFIRMED IN PART, REVERSED IN PART. REMANDED FOR RECALCULATION OF THE AMOUNT OF RESTITUTION DUE.

NOT FOR PUBLICATION

United States Court of Appeals,
For the Ninth Circuit.

Filed
Aug. 3, 2001
Cathy A. Catterson
Clerk

UNITED STATES of America, Plaintiff-Appellee,	)	Nos. 98-50748 99-50476.
v.	)	ORDER
Frank NAJJOR, Defendant-Appellant.	)	

Before: GOODWIN, HUG, and PEGERSON, Circuit Judges.

Appellant's petition for rehearing is DENIED.